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No. 99-1865

IN THE

Supreme Court of the United States

ALFRED SMALLWOOD, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

REPLY BRIEF OF THE SMALLWOOD APPELLANTS

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REPLY BRIEF OF SMALLWOOD APPELLANTS

ARGUMENT

I. There is Insufficient Evidence to Support the Decision Below

A careful reading of the Appellees' Brief on the Merits ("Br."), and of the portions of the record that are cited therein, demonstrates the absence of evidence sufficient to support the judgment entered in Appellees' favor by the majority of the court below. Instead, the only conclusion supportable on this record is that Appellees utterly failed at trial to meet their burden of proving that race was the *predominant* factor driving the North Carolina Legislature's creation of the 1997 Remedial Plan.

In this Court, as below, Appellees dismiss the State's direct proof of the Legislature's overriding political concerns and ascribe predominantly racial motivations to the members of the General Assembly based on inferences they would have the Court draw from circumstantial evidence[1] — primarily a

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[1]Appellees introduced what they describe as a "smoking gun": an e-mail from Gerry Cohen (who was on the staff of the General Assembly and prepared computerized versions of districting alternatives for the legislators). The e-mail referred to an alternative resulting from shifting groups of voters into the Twelfth District, which included, in Cohen's words, the transfer of the "Greensboro black community." Not only, as we discussed in our opening brief, does this "evidence" fail to establish the *predominance* of legislative racial motivation, *see* North Carolina Jurisdictional Statement Appendix ("NC. J.S. App.") at 48a (Thornburg, J., dissenting), but in fact it was not shown to be the view or expression of anyone other than Mr. Cohen. Joint Appendix ("Jt. App.") at 216 (Senator Cooper, one of the two addressees of the e-mail, did not remember it). Appellees offer no basis for imputing the contents of the e-mail to the North Carolina House and Senate. Their assertion that the "E-mail reveals [that], behind the scenes the principal authors of the plan had a single-minded

tortured recitation of the shape and demographic characteristics of District 12 in the 1997 Remedial Plan, *see*, *e.g.*, Br. at 14-23 — which they argue should be assessed in a vacuum, divorced from any consideration of political context.[2] But the evidence they cite will not bear the weight they seek to place upon it.

Appellees attempt to bolster their case by developing, *post hoc*, a variety of "facts" and "arguments" neither presented to nor relied upon by the lower court, and which do not survive careful scrutiny. For example, Appellees claim that "an explanation that [District 12] was constructed for a Democrat of any race to win is *probably* inaccurate if the district is 'safer' than necessary for any Democrat to win," Br. at 26 (emphasis

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obsession with the racial composition of the First and Twelfth Districts, rather than the political," Br. at 35, is an extravagant over-reading of the evidence. The majority below clearly erred in determining, based solely on the e-mail, that "the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and [] they applied this method to the 12th District," NC. J.S. App. At 27a. Rather, the evidence at trial demonstrated that the 1997 Remedial Plan was a compromise between two political parties, each of which controlled one of the two chambers of the North Carolina General Assembly.

[2]Thus, for example, Appellees continue to complain that the 1997 Remedial Plan divided Mecklenburg County, North Carolina's largest. Br. at 24 n.22. They ignore the fact that placing the entire county in a single congressional district would pit two incumbents (one Republican, one Democratic) against one another. Avoiding contests between incumbents is a traditional districting criterion that, in addition, had great partisan political significance in a State whose delegation was evenly split between the major political parties. Appellees' concern is all the more disingenuous, since their own expert proposed moving Democratic precincts currently in District 12 in Mecklenburg County into District 8, a transfer which would have resulted in a three-way county split. *See* Trial Transcript, November 30, 1999 at 312.

added),[3] and they assert for the first time in this litigation that "[t]he Twelfth District is gerrymandered so that African-Americans make up about 60% of the persons eligible to vote in a Democratic *primary*." *Id.* (emphasis added). To support this contention, Appellees cite the testimony of their expert, Dr. Weber, that "'[B]lack voters have the ability to control the Democratic nomination' and can then 'count on some crossover voting in the general election to win.'" *Id.*[4] But Dr. Weber did not claim that District 12 was gerrymandered to affect primary election results; rather, he asserted that District 12 was an "overly safe" district in general elections.

Dr. Weber's opinion was based upon a primary election analysis different from the intricate calculations set forth in Appellees' Brief, which are based on estimated registration rates by race in "urban areas" of North Carolina, Br. at 27 n.24, were never presented to the trial court, and were not tested on cross-examination. Dr. Weber opined, on the basis of a flawed analysis, *see infra* p. 4, that more African American than white Democrats would participate in primary elections in the Twelfth District and could therefore determine the nominee. In their

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[3]Ultimately, Appellees are equivocal about what even their own theories prove, asserting that their analysis "may explain" the motivation of the General Assembly and shows that the State's explanations for District 12's shape are "probably" inaccurate. *See* Br. at 26 and 28.

[4]As noted, Appellees assert that African American voters in District 12 can "'count on some crossover voting in the general election to win.'" Wisely, they do not press this point, since the low levels of crossover voting received by the African American candidates of choice in District 12 are comparable to the levels found in the districts in which this Court found vote dilution in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* Trial Transcript, November 30, 1999 at 318-320.

Brief, Appellees argue (without any record support whatsoever) that the Twelfth District was gerrymandered to have a Black "super-majority" in Democratic primary elections sufficient to overcome "single-shot" voting in favor of white candidates. This Court should not affirm the decision below based upon newly invented theories unsupported by the record, and never discussed by the lower court.

Moreover, Dr. Weber's conclusion that African American voters could "control the Democratic nomination" was based upon a methodologically flawed analysis of the primary election participation rates of white and African American voters. Dr. Weber asserts that white voters vote at lower rates in the North Carolina primary elections he analyzed. However, in North Carolina, only Democrats and unaffiliated voters may participate in the Democratic primary; Republicans are ineligible to participate. Trial Transcript, November 30, 1999 at 312-313. Since Dr. Weber's registration data did not include information about the voters' party affiliation, he was unable to separate registered voters by party. *See id.* at 313-314. The participation percentages he calculated for white voters in Democratic primary elections were based upon *all* white registered voters, including those who might be Republican and, therefore, ineligible to vote in the Democratic primary. *See id.* As a result, Dr. Weber's analysis artificially deflates the participation of white voters in the Democratic primary, since some proportion of those voters would not be eligible to participate in the Democratic primary in any event. *See id.* at 314.

Dr. Weber admitted that his analysis understated white voters' participation in the Twelfth Congressional District primary elections, testifying: "If we could, in fact, separate out

the white Republican voters from the white Democratic voters, each of the participation estimates would be higher for the white participation rate." Trial Transcript, November 30, 1999 at 314. He admitted that this is particularly true for District 12. *See id.* Therefore, Appellees' argument below, that white voters participate at lower rates than African American voters in District 12 and therefore control the primary process, was not substantiated in the record. That contention, in turn was the predicate for Dr. Weber's conclusion that District 12 is an "overly safe" Democratic district in general elections, which also fails.[5]

The majority below did not rely on nor make any findings concerning the issue of whether the Twelfth District is "too safe" and did not adopt Appellees' claims as a basis for its ultimate legal conclusions. Appellees have merely devised, *post hoc*, new formulas and analyses by piecing together "facts" that the court below never had before it, Br. at 26-28; Br. at 30 n.25, and unfairly criticize the North Carolina General Assembly for failing to adopt modifications of the boundaries for the Twelfth District that, so far as the record reflects, were never presented to the legislature. It simply defies logic to infer unconstitutional intent from the rejection of alternatives that the General Assembly *never had the option to select*.

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[5]Many of the representations about the record evidence contained in Appellees' Brief could be similarly dissected and the arguments they ostensibly support similarly discredited. However, in the interest of economy and in an effort to avoid duplicating information set forth in our opening brief and material presented by the State Appellants in their reply brief, the Smallwood Appellants have limited their recitation of the factual inadequacies of Appellees' presentation of the record below.

Moreover, Appellees offer their "alternatives" in a vacuum and in piecemeal fashion, giving isolated examples of "swaps" of voters they suggest would have been feasible and arguing that "[b]y reworking other districts, and by using a computer instead of identifying these precincts by hand . . . this list could no doubt be expanded." Br. at 30 n.25. In reality, a complete plan encompassing an entire congressional district must be developed and analyzed to determine the political and legal consequences of implementing it. Appellees themselves concede that their particular redistricting choices, reflected in one of their partial alternatives, could be non-compact, *see id.*, and their own expert admitted that his analyses did not account for the actual constraints, including various political and redistricting realities, that confronted the North Carolina General Assembly. *See* Trial Transcript, November 30, 1999 at 271-273, 278-279. Indeed, Dr. Weber displayed some contempt for the realities of the redistricting process and those legislators who must engage in it. *See, e.g., id.* at 281 (concluding that he does not trust legislators to conduct redistricting).

It would be a substantial breach of the federalism and comity principles established by this Court to dismantle a redistricting plan, forged in the politically charged atmosphere in which the 1997 Remedial Plan was developed, based simply upon Appellees' selective and untested precinct-by-precinct critique. *See infra* p. 9. As Justice Stevens said in concurrence in *Hunt v. Cromartie*, 526 U.S. 541 (1999):

> [B]izarre configuration is the traditional hallmark of the political gerrymander. . . . [T]he shape of the congressional district at issue in this case provides strong evidence that either political or racial factors

> motivated its architects, but sheds no light on the question of which set of factors was more responsible for subordinating any of the State's 'traditional' districting principles.

Hunt, 526 U.S. at 555 (citations and footnote omitted).[6]

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[6]Appellees cite the statements of two legislators in an effort to establish that the General Assembly conspired to draw the District 12 lines so as to ensure that its African American population was as high as possible without exceeding 50%. Br. at 37 n.31 and 38. The comments of Senator Cooper and Representative McMahan, on which Appellees and the majority below relied, were intended to assure legislators that (in their opinion) the plan drawn by the districting committee based on partisan political considerations would not be vulnerable to constitutional challenge. Neither of the floor leaders purported to be describing the process or criteria by which the plan was created.

Moreover, their comments are consistent with this Court's *Shaw* jurisprudence. As discussed in the Smallwood Appellants' opening brief, the fact that District 12 is not majority-black is relevant to a federal court's determination whether race was a predominant factor in its creation. *See Lawyer v. Department of Justice*, 521 U.S. 567, ___ , 117 S. Ct. 2186, 2195 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996) ("[t]he fact that District 21 under Plan 386 is not a majority black district, the black voting-age population being 36.2%, supports the District Court's finding that the district is not a 'safe' one for black-preferred candidates, but one that 'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office" [citation omitted]). *Lawyer*'s vitality does not depend upon the proposition that "the Equal Protection Clause does not apply to districts with less than 50% minority population," and Appellees mischaracterize the views of this Court, as well as the arguments of the Smallwood and State Appellants by suggesting otherwise. *See* Br. at 36 n.30.

II. Appellees Urge that this Court Adopt Legal Standards that are Discriminatory and Untenable

Appellees' arguments in support of affirmance would require this Court to announce new legal standards governing redistricting that are unworkable or that would apply only to minority candidates in a discriminatory fashion. These new standards would amount to adoption of a rule that the Court explicitly declined to announce in *Miller v. Johnson*, 515 U.S. 900 (1995): that if race was at all a factor in the creation or design of a redistricting plan — although not the *predominant* factor — the plan is *per se* illegal.[7] Appellees' arguments are inconsistent with the concern for State interests that underlies the standard of review developed in this Court's *Shaw* jurisprudence and also conflict with the Court's long-standing precedents in the apportionment context. Moreover, Appellees' contentions serve only to highlight the lower court's error in disregarding this Court's precedents when it invalidated the 1997 Remedial Plan.

First, Appellees equate preservation of some "core" portions of District 12 in prior districting plans with an invidious racial intent to discriminate in the redistricting process. *See, e.g.*, Trial Transcript, December 1, 1999 at 557 and 602; Final Pretrial Order at 10; NC. J.S. App. at 44a; Appellees' Brief on the Merits at 11 n.11 (comparing the 1992 Plan with the 1997 Remedial Plan "would seem quite relevant for the purpose of

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[7] *See, e.g.*, 515 U.S. at 916 (legislatures are "almost always . . . aware of racial demographics but it does not follow that race predominates"); *id.* (other districting principles must be *subordinated* to race) (opinion of the Court); *id.* at 928 (O'Connor, J., concurring); *id.* at 935 (Ginsburg, J., dissenting).

determining whether the unconstitutional taint of the 1992 version of the Twelfth District had been removed"). But this Court has never held, in either "one person, one vote" or in *Shaw* cases, that States are required to discard completely a prior invalidated plan in the process of devising a remedial plan.[8] Such a rule would be inconsistent with the great deference that this Court has accorded to the States' policy choices in the redistricting process, which the Court has repeatedly said should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements").

A State legislature's redistricting options should not be constrained simply because the litigants who secured invalidation of a prior plan would prefer a particular outcome;

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[8] As Judge Thornburg, dissenting below, recognized, preservation of the cores of preexisting districts is closely connected to another traditional districting principle, incumbency protection. *See* NC. J.S. App. at 44a-45a ("requiring a legislature to start completely from scratch makes their task nearly impossible because congressional incumbents and state legislators will invariably demand the preservation of as much of the geographic core of districts as possible, a political reality explained in testimony at the trial."). *See* discussion *infra* at 11-15.

rather, the State's preferences may be disregarded only to the extent necessary to ensure a remedy for the original violation. Where, as in this case, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996) ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25 (1993)); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause").

Appellees cite *Abrams v. Johnson*, 521 U.S. 74 (1997) in support of their contention that it was unconstitutional for the legislature to have sought to maintain the cores of Districts 1 and 12 in creating the 1997 Remedial Plan. *Abrams* in fact supports the legality of North Carolina's 1997 Remedial Plan. In *Abrams*, the lower court was criticized for fashioning a plan that included only one, rather than two, majority-African American districts on the ground that the plan enacted by the Georgia Legislature prior to that invalidated in *Miller v. Johnson* had included two such districts and represented the State's policy preference. The trial court in *Abrams* had rejected alternatives suggested by the parties that created a second majority-minority district because, it held, that would have required it to disregard and subordinate traditional redistricting criteria. This Court agreed, reasoning that "the State was subjected to steady Justice Department pressure to

create the maximum number of majority-black districts, and there is considerable evidence the State was predominantly driven by this consideration even in developing its 1991 [two majority-minority district] plan." *Abrams v. Johnson*, 521 U.S. 74, 86 (1997).

In this case, unlike *Abrams*, the North Carolina General Assembly in 1997 not only acted without Justice Department pressure but also rejected a plan that would have created a majority-African American District 12 by extending District 12's boundaries to Durham. *See* Brief of Smallwood Appellants at 10. The 1997 Remedial Plan reduces the number of majority-African American districts in North Carolina from two to one, and it substantially redrew the boundaries of District 12 to eliminate extensions or extremities. These facts closely resemble the manner in which the Georgia plan upheld by this Court in *Abrams* was fashioned. *See, e.g.*, Brief of Smallwood Appellants at 11-12, 23-24.[9] Reversal of the judgment below would therefore be consistent with, not contrary to, the decision in *Abrams*.

Second, Appellees urge that the return to office of an incumbent elected from an invalidated district establishes conclusively that the new districting plan is inadequate to

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[9]A further basis for distinguishing *Abrams* is that the Georgia legislature in that case had been unable to enact a plan to remedy the constitutional violation found by the Court in *Miller v. Johnson*. Here, however, the North Carolina General Assembly *did* act to cure the violations found by this Court in a manner consistent with its policy preferences. Under these circumstances, it is entitled to a presumption of good faith in its execution of the redistricting process and to appropriate deference from the federal courts — which, as discussed earlier, the majority below failed to give.

remedy the constitutional violation — but they would apply this rule only to minority incumbents who had been elected under an invalidated plan. This Court has never announced such a standard, which if given effect in all Fourteenth Amendment cases would undermine even the most routine redistricting processes; and it has never characterized the principle of *Shaw v. Reno*, 509 U.S. 630 (1993) as applying only to majority-minority districts. *See* 509 U.S. at 650-51 (equal protection analysis "not dependent on the race of those burdened or benefitted" [citations omitted]).

In this case, it is undisputed that the State sought to protect *all* incumbent members of its congressional delegation, Democratic and Republican, white *and* African American, *see, e.g.*, Jt. App. at 180-182, 211, 241; and that "every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region," Jt. App. at 50a. These facts show no more than that the legislature acted in accordance with the "political reality" in North Carolina. *See* NC. J.S. App. 44a-45a (Thornburg, J., dissenting).

Appellees argue that the 1997 Plan is not justified by incumbency protection because it is not limited to "just avoid[ing] pairing incumbents." Br. at 28. They seek on this basis to distinguish *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) from the facts in this case. Br. at 17 n.16 and 29. *See also* Br. at 36 n.30. But this Court has never constricted a legislature's ability to protect incumbents in this manner. Neither this Court in *Lawyer*, nor the lower court judgment in *Scott v. United States Department of Justice*, 920 F. Supp. 1248 (1996) that it affirmed, regarded protection of the interest of an incumbent in being re-elected in a district redrawn

following a *Shaw* challenge as an indicium of a continued constitutional violation.[10] Moreover, in each of the cases in which this Court has upheld districts redrawn after prior Constitutional invalidation of redistricting plans under the *Shaw* regime, the incumbents have been re-elected, including the districts considered in *Abrams*.

While Appellees seek to apply their rule only in the context of findings of unconstitutionality in cases brought pursuant to the cause of action recognized in *Shaw*, there is no principled reason why this rule would apply only in that context, rather than in all cases of Fourteenth Amendment violations — including "one person, one vote" suits. Since both types of lawsuits are commonplace following decennial redistricting, Appellees' proposed rule of decision would expose jurisdictions to a never-ending series of challenges to the constitutionality of any plan adopted during the post-2000 Census redistricting that succeeded in protecting an incumbent whose district had been previously found to violate the Fourteenth Amendment. This is perhaps why this Court has never adopted an absolute rule that, after an electoral district is found by a court to be unconstitutional, an incumbent is not entitled to the same level of incumbency protection as his or her counterparts when the district is redrawn.

Appellees' protests over the fact that District 12 voters have reelected Mel Watt amount to little more than a complaint that Appellees' own political preferences were not realized in

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[10]In *Lawyer*, Florida House District 21's incumbent, Representative James T. Hargrett, Jr., intervened in the case to protect his interest in being able to run for office in a district that was favorable to his electoral success.

the redistricting process. However, neither the United States Constitution nor Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, guarantee particular electoral outcomes. Even where vote dilution has been found, the remedy is limited to establishing a non-dilutive plan, not to proportional representation or some specific electoral result. *See Johnson v. DeGrandy*, 512 U.S. 997, 1014 n.11 (1994) ("the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race"). *See also Davis v. Bandemer*, 478 U.S. 109, 129-30 (1986) (plurality opinion) (lack of proportional representation does not establish unconstitutional political gerrymander); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) ("[We] are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them").

Just as the lack of electoral success is not sufficient to establish unconstitutional vote dilution or a political gerrymander, reelection of an incumbent under a revised districting plan cannot alone establish the inadequacy of a remedial plan adopted after a *Shaw* violation. As the Court recognized when this case was last before it, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Hunt v. Cromartie*, 526 U.S. at 551 (citations and footnote omitted).[11]

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[11]Appellees misrepresent the record when they suggest that evidence of racial predominance was presented at trial below in the form of testimony that Representative Watt's campaign "defined [potential voters for Watt] on the basis of race" and "targeted [these] African-American voters through direct mail, African-American newspapers, and radio stations chosen because of their predominantly African-American audience." Br. at 46, citing Jt. App. at 578-83. In fact, Representative Watt's District Director, Don Baker, testified as follows:

> Q Was there a difference in the targeted voters with respect to the African American candidate?
> A Not really; interestingly enough, not really. We have worked for many affiliated organizations. We have worked for women, senior citizens, African Americans, the Hispanic community. In the campaigns that I have been involved with that is kind of the target groups that we were working towards, keeping them involved.

Jt. App. 581.

> A. . . . We did polling to see exactly what the issues were that was on people's minds. We in turn developed mail towards target groups. Seniors was one of the target groups that we sent direct mail to. Women was a targeted direct mail. African Americans was a targeted direct mail. And we sent smaller mailers to other individual groups, organizations.

Jt. App. 582. Thus, the record testimony cited by Appellees demonstrates that Rep. Watt's campaign identified and sought the support of diverse groups of voters. Appellees, however, ask this Court to single out African American voters for electoral exclusion and to limit African American voters' full enjoyment of their right to be actors in the political process.

Third, citing *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977), Appellees contend that this Court should modify the standard announced in *Shaw*, *Miller*, and related cases by requiring that "racial motive need not be shown to be the predominant motive but

only a cause" and also propose shifting the burden of proof from plaintiffs to defendants by requiring that "the State [] bear the burden of proving that the 'taint' of a racial gerrymander has been removed." Br. at 56 n. 43. This reflects another attempt by Appellees to distract the Court from their failure to satisfy their burden of proof in this case.

As discussed in the Smallwood Appellants' opening brief, in cases such as this one, this Court has held that Appellees have the heavy evidentiary burden of proving that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines,'" *Bush v. Vera*, 517 U.S. 952, 958 (1996) (*quoting Miller*, 515 U.S. at 913), and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958 (*quoting Miller*, 515 U.S. at 916). *See generally id.* at 259-68. Specifically, as this Court has recognized, Appellees here must "prove that District 12 was drawn with an impermissible racial motive . . . [and] strict scrutiny [only] applies if race was the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. at 547. Merely showing that the State of North Carolina conducted the redistricting process with some "consciousness of race" is not sufficient. *See Bush*, 517 U.S. at 1051. Rather, this Court has acknowledged the reality that a state "'always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors" but held that "[this] sort of race consciousness does not lead inevitably to impermissible race discrimination.'" *United States v. Hays*, 515 U.S. 737, 745 (1995) (citation omitted) (emphasis in original). *See also Bush*, 517 U.S. at 993 (O'Connor, J., concurring). This is an important recognition because it avoids undue interference with

the State's development of plans that legitimately recognize myriad political and demographic considerations.

Moreover, in this very case, this Court has defined the proper role race may play when a state attempts to satisfy its various political objectives during the redistricting process, by holding that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 542 (emphasis in the original) (citing *Bush*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646). *See also* Brief of the Smallwood Appellants at 21-22.

This Court's recognition that legislatures are always aware of race in drawing district lines, and its consequent holding that legislatures may permissibly take race into consideration in that process so long as racial considerations do not predominate, carves out a limited role for federal courts in the redistricting process of States that is effective without being overly intrusive. *See Miller v. Johnson*, 515 U.S. at 915-17. The Court has declined to alter that role when a legislative plan adopted to remedy an earlier constitutionally infirm apportionment is at issue. *See Lawyer v. Department of Justice*, 521 U.S. 567 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996). While making unsupported accusations that the North Carolina General Assembly deliberately set out to evade the requirements of this Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), Appellees have presented no convincing reason why this Court should adopt the standard they describe as the "*Arlington Heights* test," which would bar *any* consideration of race by a legislature enacting a remedial

plan and make the scope of federal courts' inquiries into districting processes vastly more intrusive.

III. On the Record Before It, the Court Below Should Have Determined Whether the 1997 Plan Could Be Justified Under Strict Scrutiny

As set forth more fully in the Smallwood Appellants' opening brief, the court below erred in entering judgment in favor of Appellees based on its unsupportable conclusion that race predominated in the 1997 districting process. However, even if this Court were not to question that conclusion, the judgment of the district court cannot stand. Having found that race predominated in the creation of the 1997 Remedial Plan, the lower court should have considered whether a legally sufficient basis existed to justify that action and whether it was sufficiently narrowly tailored to accomplish that interest. *See* Brief of the Smallwood Appellants at 28-31.[12] The lower court

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[12]Appellees have mischaracterized the discussion of the stipulations in the Brief of the Smallwood Appellants. The Smallwood Appellants never suggested that Appellees stipulated to white bloc voting in the areas encompassed by District 12. Rather, the Smallwood Appellants explicitly stated the truth that Appellees stipulated to a number of facts contained in the record before the North Carolina General Assembly, including two of the three *Gingles* factors, North Carolina's long history of discrimination against African Americans, and that history's lingering effects. *See*, *e.g.*, Brief of Smallwood Appellants at 11 and 30.

In fact, no such stipulation was necessary. Appellees' own expert conceded, both in his deposition and on cross-examination at trial, that racially polarized voting patterns persisted in the elections he analyzed for the case. *See* Deposition of Ronald E. Weber, Ph.D. at 336 (in analysis of white crossover voting, "African American voters are in fact cohesive on which I guess we would call prong 2 in general elections behind Democratic candidates."); Trial Transcript, November 30, 1999 at 320

compounded this error by holding that it need not examine the existence of a compelling justification for the State's action *even if there was one*: "*[E]ven if* such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" *Id.* (emphasis added).

Appellees attempt to counter the Smallwood Appellants' arguments by charging that they constitute an admission that "the district had to be — and was — race-based." Br. at 52. This is an inaccurate distortion of the position of the Smallwood Appellants and further demonstrates Appellees' misapplication of the legal standard in this case.

First, Appellees' contention reflects their view, contrary to this Court's holdings, that a districting plan is unconstitutional simply because race was a factor in its creation. However, in accord with this Court's teachings, the Smallwood Appellants have consistently argued in this case that the 1997 Remedial Plan must be upheld because race was not the *predominant* motive for the creation of the plan. *See supra* p. 8 n.7 and accompanying text. The Smallwood Appellants' presentation of an alternative argument regarding compelling justification is consistent with their theory of the case and the rulings of this Court. It does not, therefore, constitute an admission of any sort.

Second, as discussed in our opening brief, Appellees' and the lower court's dismissive treatment of the strict scrutiny

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(levels of white crossover vote received by candidates in Districts 1 and 12 from 1990 to 1998 were in a range comparable to the levels of white crossover voting found in the districts in which this Court found vote dilution in *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

analysis finds no support in this Court's rulings and is entirely inadequate to meet the strictures of *Shaw* and its progeny. *See* Brief of the Smallwood Appellants at 29-31. The three tiered analysis demanded by *Shaw*, requires that a Court at least examine what possible legitimate interest a state may have to consider race in the redistricting process. The lower court's failure to do so here, therefore, requires that if this Court disagrees with our submission that race did not predominate in the construction of the 1997 Remedial Plan, it must therefore remand and direct the lower court to make findings concerning the State's interest in enacting such a plan and explain the basis for its decision.

CONCLUSION

For the foregoing reasons, as well as those contained in the Brief of the Smallwood Appellants, this Court should reverse the judgment of the district court and enter judgment for defendants and defendant-intervenors.

Respectfully submitted,

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